88-1014

No.

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BROTHERHOOD OF RAILWAY CARMEN,
DIVISION OF TRANSPORTATION•COMMUNICATIONS
INTERNATIONAL UNION,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the United States District Courts have jurisdiction under 28 U.S.C. § 1337(a) to enforce the commands of the Railway Labor Act when the rail carrier which is claimed to have violated the Railway Labor Act, asserts immunity from Railway Labor Act obligations by virtue of having been subject to an ICC order approving a transaction described in 49 U.S.C. § 11343 (a)?

2. Does 49 U.S.C. § 11341(a) immunize a rail carrier from Railway Labor Act collective bargaining agreement obligations otherwise applicable to changes in operations, services and facilities made feasible by a transaction approved under 49 U.S.C. §§ 11343(a) and 11344 some six years after that transaction has been consummated?

3. Does the ICC or the district courts have jurisdiction to determine whether the "necessity" requirement of 49 U.S.C. § 11341(a) has been met thereby exempting a rail carrier from its obligations under "other law"?*

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* The parties to the proceeding below are:

Appellant below and Petitioner here:

Brotherhood of Railway Carmen, Division of Transportation•Communications International Union (TCU)

Appellee below and Respondent here:

CSX Transportation, Inc.

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CSX TRANSPORTATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Brotherhood of Railway Carmen, Division of Transportation•Communications International Union [hereinafter, "BRC"] respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment of that court in *BRC v. CSX Transportation, Inc.*, 11th Cir. No. 87-8466, decided September 19, 1988.

OPINIONS BELOW

The *per curiam* decision of the Eleventh Circuit is reported at 855 F.2d 745; it is reproduced as Appendix A to this Petition at pages 1a-10a. The judgment of the appellate court is reproduced as Appendix D at pages 47a-48a. The decision of the United States District Court for the Southern District of Georgia is reported at 662 F.Supp. 1409 and is reproduced herein as Appendix B at pages 11a-22a.

JURISDICTION

On September 19, 1988, the United States Court of Appeals for the Eleventh Circuit issued a *per curiam* decision vacating the judgment of the United States District Court for the Southern District of Georgia and remanding the case to that court with instructions to dismiss the complaint for lack of subject matter jurisdiction. Petitioner is seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) to review that judgment. This petition is timely filed since it is being filed within the time period provided by 28 U.S.C. § 2101(c).

STATUTES INVOLVED

This case involves the relationship between two Acts of Congress, each of which regulates a different aspect of interstate commerce—*i.e.*, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* In particular, this case involves the impact of Sections 11341(a) and 11347 of the Interstate Commerce Act, 49 U.S.C. §§ 11341(a) and 11347, on the obligations imposed upon carriers by Sections 2 First, 2 Seventh, 5 First, and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 First, 152 Seventh, 155 First and 156, and on the federal courts' jurisdiction to enforce those obligations. Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First, Sections 11343(a) and 11344 of the Interstate Commerce Act, 49 U.S.C. §§ 11343(a), 11344, and Section 405(b) of the Rail Passenger Service Act, 45 U.S.C. § 565(b), along with 28 U.S.C. § 1337(a), are also relevant to this case. The relevant statutes are reproduced as Appendix E at pages 49a-56a.

STATEMENT OF THE CASE

Respondent CSX Transportation, Inc. ("CSXT") is a carrier by railroad and a subsidiary of CSX Corporation ("CSX"). CSX is a holding company which was formed in about 1980 to acquire and assimilate by merger two

other holding companies, Chessie System, Inc. ("Chessie") and Seaboard Coast Line Industries, Inc. ("SCLI"). These latter holding companies controlled two competing railroad systems that themselves had been formed through earlier mergers. Chessie owned or controlled a number of railroad properties including the Chesapeake and Ohio Railway Company ("C&O") and SCLI controlled, among other railroads, the Seaboard Coast Line Railroad Company ("SCL").[1] Because CSX would control two railroad carriers by its acquisition and merger of Chessie and SCLI, it was necessary for it to obtain Interstate Commerce Commission ("ICC" or "Commission") approval pursuant to 49 U.S.C. §§ 11343 and 11344 before it could effectuate that control. CSX obtained the requisite authority from the ICC in 1980 to merge the Chessie and SCLI into itself and to control their subsidiary railroads which would continue as separate corporate entities. *CSX Corporation—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980). The exercise of the authority granted CSX by the Commission was conditioned upon CSX acceptance of the so-called *New York Dock* conditions as required by 49 U.S.C. § 11347 for the protection of employees who might be affected as a result of the ICC order. *See New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Shortly after the Commission issued its decision and order, CSX exercised the authority granted, merged Chessie and SCLI into itself and assumed control of C&O and SCL.

A. The *New York Dock* Conditions

The *New York Dock* conditions provide compensatory protection for employees dismissed, displaced or transferred as a result of an ICC order approving a merger or control application. They are the minimum protective

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[1] Subsequent to the institution of this action, CSX caused the merger of SCL and C&O and these railroads became CSXT.

conditions required by 49 U.S.C. § 11347 in merger and control cases. *New York Dock Railway-Control-Brooklyn Eastern District Terminal*, 360 I.C.C. 60 (1979). Article I, section 4(a) of the conditions also requires that before a carrier can institute a change resulting from the merger or control which may cause rearrangement of employee forces, it must provide the employees with a 90-day written notice which "shall contain a full and adequate statement of the proposed changes to be affected [sic] by such transaction, including an estimate of the number of employees of each class affected by the intended changes." *Id.* at 85. The same paragraph of the conditions provides for the negotiation of a so-called implementing agreement "with respect to application of the terms and conditions of [*New York Dock*] . . . [and] shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary" by the proposed change. *Id.* Should negotiations be unsuccessful, provision is made for arbitration and finally section 4(b) provides that "No change in operations, services, facilities or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered." *Id.*

Section 2 of Article I prohibits changes in "rates of pay, rules, working conditions or other rights, privileges or benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise . . . unless changed by future collective bargaining or applicable statutes" and Section 3 prohibits the deprivation of any rights or benefits . . . which [employees] may have under any existing job security or other protective conditions or arrangements." *Id.* at 84.

The language of sections 2 and 3 is identical to that contained in conditions established by the Secretary of Labor under 45 U.S.C. § 565(b) because 49 U.S.C. § 11347 mandates such provisions be imposed to protect

employees affected by ICC approval of transactions described in 49 U.S.C. § 11343(a).

B. The Proposed Changes

On August 29, 1986, CSXT served a notice of proposed change under Article I, Section 4 of the *New York Dock* conditions stating its intent to close the SCL heavy repair shop at Waycross, Georgia and transfer the work and certain positions to the C&O heavy repair shop at Raceland, Kentucky. Appendix A at 3a. The notice stated that 149 positions would be abolished on the SCL at Waycross, of which 121 were occupied by employees represented by petitioner and 107 positions would be created on the C&O at Raceland, of which 99 would be represented by petitioner. *Id.*

Attempts to reach an agreement on the transfer proved fruitless. Petitioner, relying upon an earlier employee protective agreement [2], originally sought to arbitrate the right of CSX to move work from one of its railroads (SCL) to another (C&O) and whether it could do so in light of the restrictions contained in that separate agreement which, BRC asserted, prohibited the transfer of SCL work and employees beyond SCL property. Appendix G at 68a. CSX, however, insisted upon arbitration only under Article I, Section 4 by which an agreement submitted by it would be imposed on affected employees as the arbitrated implementing agreement. *Id.* at 71a. Petitioner opposed such an arbitration. *Id.* at 73a, 77a-78a. CSX then sought and obtained appointment of an arbitrator by the National Mediation Board under section 4(a)(1) of the *New York Dock conditions.* 360 I.C.C. at 85. The hearing before the arbitrator took place on December 18, 1986. Appendix A at 5a.

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[2] The earlier protective agreement known as the "Orange Book" because of the color of its cover, was entered into in 1966 to protect employees affected by the merger of the Atlantic Coast Line and Seaboard Coast Line railroads to form the SCL.

C. Court Proceedings

On December 17, 1986, petitioner filed an action for declaratory judgment and injunctive relief, contending that the transfer of work and employees from the SCL railroad to the C&O railroad effected a unilateral modification of existing rules and working conditions of SCL employees at Waycross in violation of sections 2 Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152 Seventh and 156.[3] The proposed transfers effected changes in the provisions of the collective bargaining agreements and in the provisions of the separate "Orange Book" protection agreement which restricts transfers of work and provides the employees covered thereby with lifetime employment. (Appendix A at 5a; Note 2, *supra.*)

The District Court stated the issue presented by the complaint as follows:

> The case presents the federal question of whether CSX's proposed transfer of the employees and work at the Waycross repair shop to Raceland, Kentucky, constitutes a violation of the Railway Labor Act, 45

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[3] While correctly describing the nature of petitioner's complaint at paragraph 5 of its opinion (Appendix A at 4a) as a suit to enjoin the proposed transfer as "a unilateral modification of existing rules and working conditions in violation of the Railway Labor Act . . ., 45 U.S.C. §§ 152 Seventh and 156", the Eleventh Circuit misconstrues the nature of petitioner's cause at the outset of its opinion (Appendix A at 2a) and as a material basis for its ruling in this case (Appendix A at 8a) when it describes petitioner's cause as one to review the award of an arbitrator. Notwithstanding the court's description of petitioner's cause of action, this case is not an attempt to review and set aside an arbitration award. The arbitration award referred to by the court was not in existence when petitioner's complaint was filed (See Appendix A at 4a-5a). Moreover, that award is the subject of a separate proceeding before the United States Court of Appeals for the District of Columbia Circuit (*Brotherhood of Railway Carmen, Division of TCU* v. *I.C.C. et al.*, No. 88-1724) having been transferred to that court by the Eleventh Circuit after it granted a change of venue motion filed by CSXT, *inter alia.*

> U.S.C. §§ 152, First and Seventh and 156; or whether the proposed transaction is exempt from the application of the RLA due to the ICC's exercise of its exemption authority under the Interstate Commerce Act, 49 U.S.C. § 11341(a).

Appendix A at 8a; Appendix B at 17a.

The District Court held it had jurisdiction under 28 U.S.C. §§ 1331 and 1337 to consider petitioner's complaint under 45 U.S.C. §§ 152 First, 152 Seventh and 156, and 49 U.S.C. § 11341 (Appendix B at 17a), but concluded that the authority provided the Commission by section 11341(a) superceded the Railway Labor Act and contract rights of the affected employees. *Id.* at 21a.

On appeal, the Court below in a *per curiam* opinion did not reach the issue of preemption because it:

> . . . [A]gree[d] with CSX that this action is an attempt by [petitioner] to bypass the appropriate procedures for review of the arbitration award. . . . We agree with CSX that the present lawsuit is, in effect, a collateral attack on the arbitration award; it is an attempt by [petitioner] to have the district court set aside the arbitration award, rather than going through the normal channels of appeal to the ICC and then to the Court of Appeals.[4]

Appendix A at 8a.

Petitioner had contended that no collateral attack on the 1980 ICC order could be substantiated in this case because only the courts, not the Commission, have authority to determine the effect of ICC orders on other laws such as the RLA. To that contention, the Court responded:

> While we recognize that the "collateral attack" analogy is not perfect, we find it instructive; . . .

Id. at 9a. The Court then concluded "that subject matter jurisdiction [being] absent, [it] need not reach the

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[4] See footnote 3, *supra.*

merits." *Id.* at 10a. The Court vacated the order of the district court and remanded the case with instructions to dismiss for lack of jurisdiction.

The Commission in the meantime, having reviewed the arbitration award on the appeal of CSXT and the later cross-appeal of petitioner, held the arbitrator to have been correct in ruling the Commission's authority superceded employees' rights under the RLA and their collective bargaining agreements; but reversed the arbitrator's ruling upholding certain of the employees' rights contained in the "Orange Book" because the ICC disagreed with the factual finding of the arbitrator that upholding those employee rights would only "slightly impair" the carrying out of the transaction. (Appendix C at 35a-36a.) That decision of the ICC is the subject of a petition for review to the United States Court of Appeals for the District of Columbia Circuit. *See* note 3, *supra.*

REASONS FOR GRANTING THE WRIT

This Case Presents Important Issues Of Federal Law That Have Been Decided In A Manner Which Conflicts With Applicable Decisions Of This Court, Other Courts Of Appeals And With The Intent Of Congress. Moreover, Those Issues Have Been Decided In A Manner That Needlessly Creates A Conflict Between Two Acts Of Congress Regulating The Rail Industry Which Has Caused And Will Continue To Cause Serious, Worsening Labor-Management Strife Throughout The Industry.

I. This Case Presents Issues Of Importance To The Rail Industry And To The Process Of Administrative Law That Need To Be Resolved By This Court.

The policy of Congress for the governance and regulation of interstate commerce by rail carriers is found principally in two statutes, the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (hereinafter, "ICA") and the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (hereinafter, "RLA"). These Acts govern two basic but discrete as-

pects of rail transportation. The ICA expresses the Congress' basic rail transportation policy and the RLA, its basic rail labor policy; the goal of each being to maintain insofar as possible, uninterrupted rail transportation service throughout the nation. *Texas and New Orleans R. Co., et al. v. Brotherhood of Ry. and Steamship Clerks, et al.* 281 U.S. 548, 564 (1930).

For some sixty-two (62) years the RLA and ICA have existed side-by-side and not once during the first fifty-seven (57) years of their co-existence did the courts or the ICC conclude that there was in fact any irreconcilable conflict between them. *Compare Chicago, St. Paul M&O-Lease*, 295 I.C.C. 696, 701-02 (1958), *with Southern Ry.-Control*, 331 I.C.C. 151, 169-71 (1967). However, in 1982, the Commission began to redefine its role under the Interstate Commerce Act and became an active, innovative partner in the rehabilitation and future course of the rail industry. Whereas throughout its history the Commission had maintained it could not intrude itself into labor relations in the rail industry,[5] in 1982 it began to demonstrate an active leadership role in directing the future course of that industry. *See Knox & Kane R. Co.—Gettysburg R.—Petition for Exemption*, 366 I.C.C. 439 (1982), in which the Commission laid the foundation for its creation of the short line phenomenon by eliminating employee protective conditions in line sales. In 1983 it broke with its earlier contrary decisions and, without citing them, held that its approval of a trackage rights agreement between railroads carried with it approval of

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[5] See testimony of ICC Commissioner Joseph B. Eastman at the hearing held on the 1940 amendments to ICA in which he answered the concerns of some Senators that the ICC might become involved in rail labor relations as a result of enactment of section 5(2)(f) (now 49 U.S.C. § 11347). Hearings on H.R. 7650 Before House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. at 54 (1934). Commissioner Eastman said:

> . . . [ICC has] no jurisdiction over labor matters at all and never [has] had.

all material terms set forth in the application, including those which governed the employment of crews to man the trains. It relied on 49 U.S.C. § 11341(a) to relieve the carriers involved from their obligations under the RLA regarding such employment of crews. *See* ICC Decision in *Missouri-Kansas-Texas Railroad Company—Trackage Rights—Missouri Pacific Railroad Company*, Finance Docket No. 30,000 (Sub No. 25), decided October 19, 1983 (unpublished) and cited in the ICC's Petition For A Writ of Certiorari to the United States Court of Appeals For The District of Columbia Circuit, Sup. Ct. No. 85-792 at Appendix G (p. 55a) (1982).[6] The ICC then advanced its authority a bit further and held that its formal approval of a transaction extended to all matters the applicant carrier brought to its attention during the course of a proceeding. ICC Finance Docket No. 30800, *Union Pacific Corp.—Control*, at 82, served May 19, 1988; *see also*, Appendix C at 35a-36a. Finally, in 1985 the Commission took the ultimate position on its authority and has since been implementing that position. In *Maine Central R.R. Co., et al.-Exemption from 49 U.S.C. 11342* and *11343*, ICC Finance Docket No. 30532 (1985), *aff'd sub nom. RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987) (Table), the Commission held:

> It is that [Commission] order, not RLA [Railway Labor Act] or WJPA [Washington Agreement for protection of employees], that is to govern employee-

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[6] *Contra, Illinois Central Gulf R.R.—Trackage Rights—C&IM, ICC* Finance Docket No. 28046 (1970), in which the ICC refused the carrier's request to impose the crew manning terms contained in an ICC-approved trackage rights agreement and said:

> . . . [T]he Commission's subject matter jurisdiction was solely over matters affecting transportation services and [that the I.C.C. could] determine only that this provision and other provisions in the agreement would have no adverse transportation effects; that as to all other subject matters, including matters relating to labor relations as may fall within the purview of the Railway Labor Act the [Commission] decline[s] jurisdiction over such questions.

management relations in connection with the approved transaction.[7]

During the three-year period since its decision in the *Maine Central* case, the Commission has proceeded to extend its immunizing authority under section 11341(a) to any activity the carrier wishes to undertake following a merger regardless of whether the ICC has statutory authority to approve such activity; whether such activity was ever made known to the Commission during the pendency of the merger or control proceeding; or, whether the statutory transaction approved by the ICC had been consummated many years before the particular activity was contemplated. *CSX Corporation—Control—Chessie System, Inc.*, ICC Finance Docket No. 21215 (Sub-No. 4) (decided June 8, 1988), *appeal pending, BRC v. ICC et al.*, D.C. Cir No. 88-1724 (a copy of the Commission's decision is attached as Appendix C at 23a to 46a.). The railroads have been using ICC approval orders to rid themselves of collective bargaining obligations rather than attempting to bargain for the elimination or modification of such obligations as required by the Railway Labor Act. *See, Arbitration Between BLE and Union Pacific R.R. and Missouri Pacific R.R.*, ICC Finance Docket No. 30,000 decided January 17, 1985 (Seidenberg, Neutral) (a copy of that decision is attached hereto as Appendix F at pages 57a-67a). Moreover, relying upon the collateral attack rule expressed in *Venner v. Michigan Central R.R.*, 271 U.S. 127, 130 (1926), and their belief that the ICC has been given exclusive jurisdiction over labor disputes arising from ICC regulated transactions, the railroads have argued, often successfully as in the instant case, that rail labor may not ask the federal courts to enforce the Railway Labor Act.

Even though the impact of ICC orders on rail employees' substantive and enforcement rights under both the

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[7] See footnote 6, *supra*.

Railway Labor Act and their collective bargaining agreements has been a frequent subject of litigation between rail labor and management during the past five years, that question is still in dispute. *Compare, BLE v. B&M*, 788 F.2d 794 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986), *with RLEA v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988), *cert. granted*, 57 U.S.L.W. 3370 (November 28, 1988). Indeed, it is not even settled today whether rail labor can invoke the aid of the federal courts to determine whether the Railway Labor Act is, or is not, superceded, for the lower courts are divided on whether such a suit is a collateral attack on the ICC's order authorizing or exempting the financial transactions. *Compare, BLE v. B&M, supra*, 788 F.2d at 801, *and UTU v. Burlington Northern R.R.*, 672 F.Supp. 1579 (D. Mont. 1987), *appeal pending*, 9th Cir. No. 87-4386, *with RLEA v. Pittsburgh & Lake Erie R.R., supra*, and *Burlington Northern v. UTU et al.*, 7th Cir. No. 88-2180, decided November 18, 1988.

Petitioner respectfully submits that it is crucial to the stability of the rail industry today that this Court settle the current dispute over the relationship between the transportation and labor statutes. As may be expected, the abrogation of contractual and statutory rights has severely strained labor relations in the rail industry, and when coupled with the lack of any meaningful forum to enforce existing rights, has forced rail labor to exercise its economic powers to enforce those rights. To date, there have been two strikes and the threat of five other strikes because of the carriers' belief that the Interstate Commerce Act relieves them of their Railway Labor Act and contractual obligations. *See*, Petition for Certiorari in Supreme Court No. 87-1911, at 17. Because the underlying dispute between the parties is essentially a legal one, a negotiated resolution is difficult and, thus, any one of those strikes may lead to a nation-wide curtailment of rail service. *See, Burlington Northern R.R. v. BMWE*, 481 U.S. ——, 95 L. Ed.2d 381 (1987).

Since the frequency of the carriers' use of the ICC's putative powers has increased in the past year, the rail industry does not have the time to see if the lower appellate courts can reconcile the widely divergent views on this issue. More important, however, such a reconciliation is unlikely because, when examined closely, the Eleventh Circuit's approach is contrary to the Interstate Commerce Act,[8] to prior decisions by this Court,[9] and to earlier decisions by the appellate courts,[10] wherein the courts and the ICC all have acknowledged that it is the tribunal called upon to enforce the law which the carrier contends has been affected by 49 U.S.C. § 11341(a), which is to determine if the carrier is correct in its contention.

In view of the extreme importance of these issues to the orderly administration of the Railway Labor Act and the Interstate Commerce Act, petitioner respectfully submits that this Court should conclude what it attempted to do two years ago when it granted certiorari in *ICC v. BLE* and determine whether there is in fact a conflict between the two Acts of Congress, and if so, which statute under what circumstances prevails.

II. The Decision Below Was Decided In A Way That Conflicts With Applicable Decisions Of This Court.

In concluding that the district court lacked jurisdiction to consider petitioner's complaint to enforce the Railway Labor Act, the Eleventh Circuit found that it was "in effect a collateral attack on the arbitration

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[8] See brief of ICC to this Court in *ICC v. BLE*, Sup. Ct. No. 85-792 pages 18-20: "Congress gave the Commission authority to examine, condition, and approve transactions. The immunization is a statutory consequence of Commission approval."

[9] *Schwabacher v. United States*, 334 U.S. 182 (1948); *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948).

[10] *Brotherhood of Locomotive Engineers et al. v. Chicago and North Western Ry. Co.*, 314 F.2d 424, 428 (8th Cir. 1963); *Texas & N.O.R.R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962).

award" which is "an extension of the authority of the ICC". Appendix A at 8a.[11] That determination gives to the ICC, not the federal courts, the exclusive jurisdiction to determine exactly how rail labor's rights will be protected in this case. That approach to the relationship between the Interstate Commerce Act and the Railway Labor Act, petitioner submits, is contrary to prior decisions of this Court which have emphasized that the Commission does not have jurisdiction to enforce laws other than the Interstate Commerce Act, and that it is the tribunal called upon to enforce that "other law" that is to determine the impact of the ICC's order on the rights protected by the "other law". *E.g. Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122-23 (1948); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944); *see also, ICC v. BLE, supra*, 96 L. Ed.2d at 247 n.13 (Stevens, J. concurring).

In *McLean Trucking*, this Court addressed the relationship between the Commission's obligation to consider the policies of overlapping, non-transportation laws and the enforcement of those laws. In that case, which involved the anti-trust laws, this Court stated (321 U.S. at 79-80):

> . . . Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies. That delegation does not necessarily include either the duty or the authority to execute numerous other laws. . . .
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> But in executing those policies the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter. The precise adjustments which it

[11] See note 3, *supra*.

> must make, however, will vary from instance to instance depending on the extent to which Congress indicates a desire to have those policies leavened or implemented in the enforcement of the various specific provisions of the legislation with which the Commission is primarily and directly concerned. . . .

McLean Trucking's teachings were amplified in *Seaboard* when this Court raised *sua sponte* the question of whether a State court called upon to decide the impact of an ICC order on a State law had jurisdiction to entertain that suit, or did the federal courts which had jurisdiction to review the ICC order have exclusive jurisdiction over that question. 333 U.S. at 122. This Court concluded that the State court had jurisdiction. In reaching that conclusion, this Court stated (333 U.S. at 123):

> [T]he state court . . . had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the order, properly interpreted, did exempt [the railroad] . . . from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order.

When these principles are applied to this case, it becomes clear that the ICC, in discharging its duties under the Interstate Commerce Act, has to consider the impact of its orders on rail labor's rights under other laws, such as the Railway Labor Act. Petitioner fully recognizes that the question of whether the ICC has discharged that responsibility is reviewable solely in the courts of appeals under 28 U.S.C. §§ 2321(a) and 2341, *et seq.* However, that question is separate and distinct from the issues of whether the ICC's order supercedes the Railway Labor Act and existing collective bargaining agreements, and whether those non-ICC related rights are enforceable. Those questions, according to *Seaboard* and to four Justices of this Court in *ICC v. BLE*, are to be decided by the "tribunal that is faced with a claim that a party is violating" the non-transportation statute. *ICC v. BLE*,

supra, 96 L. Ed.2d at 247 n.13; *see also, BLE v. Chicago & North Western Ry., supra* note 10, 314 F.2d at 428.

In this case, the Circuit Court's refusal to permit the district court to accept jurisdiction over rail labor's complaint was grounded on the assumption that the ICC had the responsibility to enforce the public policies behind the Railway Labor Act in transactions over which the ICA gave it jurisdiction. Appendix A at 8a-9a. But such an assumption is contrary to this Court's holding in *McLean Trucking* and, in light of the ICC's explicitly limited role over labor issues, effectively means that those national rail labor policies are being ignored.

The Eleventh Circuit did not expressly address the issue of the effect of 49 U.S.C. § 11341(a) upon the authority of the ICC in this proceeding but that provision lies at the base of its holding that a suit to enforce the Railway Labor Act rights of employees constitutes a collateral attack either upon an eight-year old fully consummated merger and control order of the Commission or upon an arbitration award entered into under employee protective conditions imposed by that 1980 order.

The case law applying 49 U.S.C. § 11341(a) has become confused and confusing. In *ICC v. BLE, supra*, 96 L. Ed.2d at 247 n.13, the four Justices of this Court, in concurring in the remand of the case, provided a specific indication of the effect of that provision when they stated that the exemption authority conferred upon the ICC by 49 U.S.C. § 11341(a) was self-executing and its "necessity" in a given set of circumstances was to be determined by the "tribunal that is faced with a claim that a party is violating some 'other law'." The guidance provided by the concurring justices in that case, however, has been largely ignored by the ICC. Although the Commission itself argued to this Court in *ICC v. BLE, supra*, that section 11341(a) was self-executing, it now determines in individual cases that exemption from the Rail-

way Labor Act and collective bargaining agreements are "necessary" to "carry out" or "carry into effect" orders approving mergers and other forms of financial consolidations authorized under the Interstate Commerce Act. *See e.g.*, Appendix C at 35a-36a.

The Courts of Appeals which have held that rail labor's efforts to enforce its Railway Labor Act rights constitute collateral attacks upon ICC orders either refuse to address the "necessity" issue as occurred in this case and in *UTU v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988), or hold impliedly at least, that the exemption authority conferred by section 11341(a) is "necessary" to the "carrying into effect" or the "carrying out" of the ICC order, though that order, as in the instant case, may have been fully consummated in all its terms some six years prior to the acts complained of. *See, BLE v. Boston & Maine Corp., supra*, 788 F.2d at 801-02.

The employees in the railroad industry face a Commission which has concluded the section 11341(a) exemption is automatically "necessary" to implement any operational, service or facility change made feasible by an order of approval issued pursuant to 49 U.S.C. §§ 11343 and 11344, (Appendix C at 35a-36a) as well as a growing number of courts of appeals and district courts which just as automatically conclude that actions to enforce Railway Labor Act rights are collateral attacks on ICC orders without determining whether the "necessity" criterion of section 11341(a) has been met. However, the "necessity" component is an essential element of the statute's immunity provision. To prevent the judicial repeal of this essential constituent part of an Act of Congress, it is necessary that this Court review this case and address the impact of the Interstate Commerce Act and section 11341(a) both upon the jurisdiction of federal courts to enforce the Railway Labor Act, and on that labor statute itself. Inextricably meshed with that issue is the question of the affect of 49 U.S.C. § 11347, which

requires the preservation of the very rights, which according to the Commission, section 11341(a) supercedes. When Congress amended section 11347 in 1976, to require the ICC to preserve the collective bargaining agreement and other rights of employees, it did not then or later amend the exemption authority of the Commission which had existed for many years as contained in section 11341(a); nor did it condition its command to preserve employee rights upon the application of section 11341(a) to those rights. It would seem reasonable to conclude that since every order issued under 49 U.S.C. §§ 11343 and 11344 must contain a section 11347 condition preserving employee collective bargaining agreement and other rights, such a condition could not be considered as impairing the "carrying out" of the very transaction to which Congress required it be attached.

CONCLUSION

For the reasons set forth herein, petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in *BRC v. CSXT*, *supra*.

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